

Office of the Access  
to Information and  
Privacy Commissioner

New Brunswick



Commissariat à l'accès  
à l'information et à la  
protection de la vie privée

Nouveau-Brunswick

## REPORT OF THE COMMISSIONER'S FINDINGS

### *Right to Information and Protection of Privacy Act*

Complaint Matters: 2013-1437-AP-748, 2013-1438-AP-749,  
2013-1439-AP-750, 2013-1440-AP-751, 2013-1441-AP-752

Date: February 18, 2014

*Case about access to personal information and the job competition process*

## INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"), and stems from five complaints involving the New Brunswick Community College ("NBCC").
2. While employed by NBCC, the Applicant applied for two publicly advertised competitions but was not selected as the successful candidate. Dissatisfied with the results of the competition process, the Applicant made five access to information requests to NBCC in order to determine what personal information NBCC held about the Applicant. The Applicant also wanted to find out more about the competition process itself at NBCC with a special emphasis on the evaluation of qualifications of candidates, including the Applicant's own evaluation and that of the candidates who applied for these employment competitions.

("the Requests")

3. In responding to each of the Requests, NBCC granted the Applicant access to some information while refusing access to other. These records were released:
  - emails sent to and from the Applicant's NBCC email account, with minor redactions to protect the privacy of other individuals;
  - emails among NBCC staff in relation to the Applicant;
  - the main information page from the Applicant's Employee Self-Service account;
  - the advertised competition posters;
  - the Applicant's resumes and cover letters;
  - the initial screening sheets completed by NBCC staff, separate from the candidate interview process, detailing basic qualifications of those who submitted applications, with redactions of the names of all the other candidates to protect their privacy; and,
  - a blank copy of the interview guide used during the candidates' interviews.
4. NBCC refused access to the remainder of the requested information for various reasons, including that releasing some emails from the Applicant's email account could affect the

privacy of other people, all files on the NBCC computer internal shared drive created by the Applicant would affect the privacy of other people, and that all other information relating to the advertised competitions, including other candidates' covering letters and resumes, and interview guides, notes, and rating guides from members of the interview panel (board of examiners), could not be released on the basis of paragraph 32(a), i.e., that this information was confidential to NBCC's candidates' evaluation process.

(“the Responses”)

5. The Applicant was not satisfied with NBCC's Responses and filed five Complaints asking the Commissioner to investigate the refusal, believing to be entitled to receive:

- The Applicant's personal information stored on NBCC's internal shared computer network;
- The Applicant's personal information stored in the Applicant's Employee Self-Service account on NBCC's intranet site;
- Information about other candidates' education, qualification and work experience in relation to the advertised competitions, which the Applicant believed could be provided with the individual's names redacted;
- Information about the evaluation of other candidates;
- The Applicant's personal information in relation to the advertised competitions, including the completed evaluation records in relation to the Applicant; and
- Additional records of communications among College staff pertaining to or relating to the Applicant, which the Applicant believes exist and were not provided.

(“the Complaints”)

6. In these Complaints, the Applicant also sought access to information that had not been specifically requested in the Applicant's Requests. We note for the record that our investigation parameters must adhere to the information initially requested and the response provided. An applicant is always free to submit another request for information that was not asked in the initial request.

7. The Complaints raised interesting questions surrounding the issue of what information can an unsuccessful candidate in an employment competition with a public body obtain, including information that belongs to the candidate and to other candidates in the same competition. This was the first occasion for our Office to delve into the interpretation and correct application of paragraph 32(a) of the *Act*.

## INVESTIGATION

### INFORMAL RESOLUTION PROCESS

8. The Commissioner's authority to investigate and resolve complaints is established under the Commissioner's investigative powers as set out in section 68. Subsection 68(2) delineates the parameters of an informal resolution of a complaint:

68(2) The Commissioner may take any steps the Commissioner considers appropriate to resolve a complaint informally to the satisfaction of the parties and in a manner consistent with the purposes of the *Act*.

9. In our view, the words "*in a manner consistent with the purposes of the Act*" set the standards by which a resolution can be achieved and cannot signify a mediated settlement or an outcome obtained by the parties' compromise. There is a significant difference between an informal resolution in a manner consistent with the purposes of the *Act* and a mediation process to resolve a complaint.
10. The purposes of the *Act* set out in section 2 codify the public's right of access and a public body's statutory obligations to provide access and protect sensitive information, and establish an independent review mechanism by the Commissioner for decisions made in relation to those rights and obligations:

2 The purposes of this Act are

(a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act,

(...)

(c) to allow individuals a right of access to records containing personal information about themselves in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act,

(...)

(e) to provide for an independent review of the decisions of public bodies under this Act.

11. It follows that the Commissioner's authority to affect an informal resolution of an access complaint to the satisfaction of the parties requires that it be done in a manner that respects the law, upholds an applicant's access rights, and fulfills a public body's statutory obligations. For that reason, the Commissioner and her Office cannot broker private agreements or settlements between the parties that will mean in the end that rights of access to information were not fully upheld or that a public body's statutory obligations were not completely fulfilled.
12. The informal resolution process must remain consistent with the purposes of the *Act*.
13. The primary goal in the informal resolution process is to allow both public bodies and members of the public to be guided by the Office of the Commissioner in better understanding the *Act's* rules and how they are applied to achieve a result that is satisfactory to both parties and that fully respects the law.
14. New Brunswick is one of three Canadian jurisdictions where the oversight body has the authority to informally resolve complaints "*to the satisfaction of the parties and in a manner consistent with the law*" (also in Manitoba and Newfoundland and Labrador).
15. Several other Canadian jurisdictions have added to their legislation the use of mediation or a mediator to settle access complaints or issues of privacy by their oversight offices (for instance, in Nova Scotia, Prince Edward Island, Ontario, Alberta and British Columbia). There is no such provision in the New Brunswick statute, meaning that the *Act* did not intend the Commissioner's Office to be a mediator of issues surrounding access to information or breach of privacy.
16. It follows that there can be no mediated outcome to the informal resolution process for the reason that a mediated result to an access to information complaint could permit the public body not to release all of the information the *Act* stipulates it should. This would mean that the public may not receive all of the information the *Act* stipulates the public has a right to receive.
17. Therefore, the Commissioner's informal resolution process is designed to achieve a lawful and proper outcome and has incorporated all of the same steps necessary to any investigation, with the added feature that a public body is invited to resolve the complaint by correcting any error it may have made in the application of the law when refusing access to information.
18. A full description of the steps involved in the Commissioner's information resolution process can be found on our website at <http://info-priv-nb.ca>. Here is a summary of what this process provides:

- to the public body, the benefit of our independent Office's interpretation of the law and an opportunity to correct any error in access that may have been made;
  - for the public body, the satisfaction of having complied with its obligations under the *Act*;
  - to the public who sought access to the information (the applicant), the benefit of an independent analysis of which information was truly required to be released under the *Act*; and
  - for the public, the satisfaction of understanding right of access to information and having that right respected under the *Act*.
19. We conclude by stating that a public body is free to participate or not in the informal resolution process, and likewise, to make decisions to release or protect information under the *Act*.
20. Having said this, however, the Commissioner is nevertheless left with a statutory obligation to ensure conformity with the *Act* and this means that a complaint must be resolved in conformity with the *Act*. We will therefore have no choice in our role as the oversight body under this legislation but to issue recommendations where we find that the public body has not complied with the *Act*.

### ***Informal resolution undertaken in this case***

21. As with any complaint under investigation by the Commissioner's Office, we sought to resolve the matter informally to the satisfaction of the parties and in conformity with the *Act*. Having explained at the outset the tenor of the informal resolution process, we were pleased that NBCC was agreeable to participate and we had good discussions. The review we undertook with NBCC officials was both cooperative and fruitful.
22. We began our investigation of the Complaints by reviewing all elements of the Requests, as well as the results of NBCC's search and identification of relevant records, and obtaining from NBCC the details in how it had arrived at decisions in its Responses to provide access to some records while having refused access to others.
23. NBCC is to be commended for its sound records management system. Search results were adequate but for a few records that were missed and we speak of this below. Moreover, our Office was provided with unrestricted access to the relevant records for our examination in this investigation and received good cooperation from staff.

24. After our first analysis of the entire matter, we gave our initial findings to NBCC along with our interpretation and application of paragraph 32(a) for confidential evaluation records. Paragraph 32(a) is an exception to disclosure that may lawfully prevent access to some information derived from an employment evaluation process. Our analysis showed that the Applicant was entitled under the *Act* to receive more information.
25. NBCC agreed to provide the Applicant this additional information as part of the informal resolution process; however, NBCC wanted to do so at this time only in the Applicant's case, as an exception to its general rule to not provide access to this type of information. In other words, NBCC wanted to reserve the right to continue to refuse access to the same type of information in future access to information cases.
26. A public body of course has the right to disagree with our interpretation of the *Act*, and in fact, we welcome such dialogues as it provides an excellent opportunity to better understanding the public body's approach to the applicant of the *Act* and to have frank and meaningful discussions about the application of exceptions to disclosure in light of the spirit and intent of the law. We strive to be thorough in all of our complaint investigations, and a public body's reasoning on how it thinks the *Act* should be applied in a particular case is a valuable contribution to our analysis, as are an applicant's comments or representations.
27. Although we appreciated and carefully reviewed all representations provided to us by NBCC on the interpretation and application of paragraph 32(a), we regrettably could not agree. We cannot accept a compromise on the application of paragraph 32(a), or any other provision of the statute, as our legal mandate requires us to resolve complaints in accordance with the *Act*. This is the reason why we were unable to resolve these Complaints informally.
28. As a result, the matter became the subject of the present Report of Findings to conclude our investigation of these Complaints as required by section 73 of the *Act*.

## ANALYSIS AND FINDINGS ON NBCC'S RESPONSES

### *Adequacy of search for records*

29. Upon receipt of the first Requests in December 2012, NBCC officials began gathering the relevant records. In regards to the emails in the Applicant's Outlook account, internal information technology services helped with search of records and provided all records in both in and outbox for processing. As for communications among staff about the

Applicant, NBCC identified key staff involved and asked them to conduct searches of their emails and handwritten notes for any information in relation to the Applicant.

30. To search for the Applicant's personal information on NBCC's internal shared drive (electronic shared access point for staff), officials looked to "working files" generated during the Applicant's employment and found they consisted of the Applicant's work product, i.e., files created for work generated as a result of the Applicant's employment duties. NBCC did not find any personal information of the Applicant in these files and NBCC remained confident that an adequate and thorough search for all relevant information had been conducted. We agreed.
31. As for the information in the Employee Self-Service intranet site that employees can access for their employment information, this included general employment information, pay stubs, leave summary, pension information, and career management information. The Applicant received a copy of the main screen showing the Applicant's basic employment information, but no further information from the Applicant's account was provided. When we looked further into this question, NBCC advised us that the Applicant's Outlook calendar also was overlooked during the search process.
32. With regards to the later Request for the Applicant's personal information in communications involving a certain named person, subsequent searches were conducted by staff to see if any additional records or information relating to the Applicant existed. No additional records other than those provided to the Applicant in January 2013 were found.
33. Officials were able to quickly retrieve competition information as those relevant records were contained in the two competition files.
34. Overall, we found that officials conducted an adequate search for records, apart from overlooking the Employee Self-Service and Outlook calendar records. In processing requests, it is important to ensure that the full scope of the request is well understood by those who will be assisting in the conduct of a thorough search for relevant records. Given this finding, we will recommend that NBCC conduct additional searches for the relevant records that may be found in the ESS and Outlook calendars and release them to the Applicant.



***Access to emails, notes, files and other communications regarding the Applicant***

35. Access to emails was provided to the Applicant and NBCC redacted some information on the basis that its disclosure would be an unreasonable invasion of a third party's privacy as per paragraphs 21(2)(e) and (h):

21(2) A disclosure of personal information about a third party shall be deemed to be an unreasonable invasion of the third party's privacy if

(...)

(e) the personal information relates to the third party's employment, occupational or educational history...

(...)

(h) the personal information consists of personnel recommendations or evaluations, character references or personnel evaluations...

36. The redacted information in the emails consisted mostly of names of students. NBCC was aware that the names of the students were known to the Applicant but, in the context of a right to information response, we agree with NBCC's decision to refuse access to the student names as the disclosure would be an unreasonable invasion of the students' privacy under paragraph 21(2)(e) as it relates to their educational history.
37. As for emails that were refused in full, we had the benefit of reviewing these records and they did not contain the Applicant's personal information, therefore these emails were not relevant and were properly withheld.
38. We found that the records contained on NBCC's internal shared network were working files in relation to the Applicant's employment duties and responsibilities and none contained the Applicant's personal information. Although NBCC refused access to this information on the basis that it contain student information and is properly protected under paragraph 21(2)(e), we add that the files were not released to the Applicant on the basis that they were not relevant to the Requests as they did not contain information that belonged to the Applicant.

***Competition information***

39. In this case, the Applicant sought access not only to the Applicant's own competition information but also that of the other candidates who participated in the employment competitions.

40. On the question of access to the employment competition information in which the Applicant was a candidate, NBCC refused access to some of the other candidates' information and provided the Applicant with:
- competition posters, as advertised;
  - the Applicant's resumes and cover letters;
  - initial screening sheets to show whether candidates met the essential requirements of the advertised competitions, with redactions of the names of candidates except for that of the Applicant; and,
  - a blank copy of the Interview Guide.
41. We reviewed the screening sheets and found that the names of individuals who applied for the job competitions found on the screening sheets were properly redacted under paragraphs 21(2)(e) and (h) of the *Act*. These names are the personal information of other candidates who applied for the positions and the screening sheets provide details about their educational and work experience as well as explanatory notes as to why each person was *screened in or out*.
42. We also noted that the screen sheets contained handwritten comments that were not very legible when copied, which may be why the Applicant again requested these records in the later Requests. We will recommend that legible copies of these records be released to the Applicant with the appropriate redactions.

***Reliance on paragraph 32(a)***

43. As for all other information contained in the competition files, including the records detailing the Applicant's evaluation and all information relating to the other candidates, we recall that NBCC refused access in full on the basis of paragraph 32(a):

32 The head of a public body may refuse to disclose to an applicant personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for

(a) employment or for the purpose of awarding a contract...

44. As stated earlier, this was the first opportunity our Office had to consider the interpretation and application of this provision, and as a starting point, we looked to other Canadian jurisdictions' similar provisions in their respective access legislation.

45. We found that Manitoba has the same wording in its *Freedom of Information and Protection of Privacy Act*:

30(1) The head of a public body may refuse to disclose to an applicant personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for employment, or for the purpose of awarding a contract.

(Emphasis added)

46. There is no caselaw interpreting the Manitoba provision for employment competitions. Therefore, we looked to the Manitoba *Freedom of Information and Protection of Privacy Resource Manual* published by the Manitoba Government.<sup>1</sup>

47. The Manitoba Guide indicates the public body can only rely on this exception when all of the following conditions exist:

- The information is about the applicant (who was also a candidate for the employment competition) and therefore constitutes the applicant's personal information;
- The information in question has been provided to the public body explicitly or implicitly in confidence; and,
- The information was provided for the purpose of determining the applicant's suitability, eligibility or qualifications (in the employment competition).

48. The Guide further stipulates that this exception can only apply where the information has been *provided* to the public body and it cannot be information that has been created or generated by the public body.

49. The Newfoundland and Labrador's *Access to Information and Protection of Privacy Act* also has a similar provision based on "provided," but this exception to disclosure came into force in 2012 and has not been the subject of interpretation by either the Newfoundland and Labrador Commissioner's Office or the courts.

50. In looking at other Canadian jurisdictions' access laws, we found that their respective similar provisions are broader in scope as they capture records that are "evaluative or opinion material" and they also are records "compiled solely for the purpose of

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<sup>1</sup> *Manitoba Freedom of Information and Protection of Privacy Resource Manual*, p. 5-274 to 276.

determining the applicant's suitability..." (see Nova Scotia's *Freedom of Information and Protection of Privacy Act*, s. 19C, Prince Edward Island's *Freedom of Information and Protection of Privacy Act*, s. 17, Ontario's *Freedom of Information and Protection of Privacy Act*, s. 49, Saskatchewan's *Freedom of Information and Protection of Privacy Act*, s. 31, Alberta's *Freedom of Information and Protection of Privacy Act*, s. 19).

51. We note the use of the word "compiled" rather than "provided" as significant in how we must interpret the New Brunswick provision.

*Provided versus compiled*

52. Having found the similarity with the Manitoba provision and distinction in other Provinces' statutes, we researched further to find the true intent of the New Brunswick provision. In this regard, we looked to the wording of other provisions found in our New Brunswick Act that used the word "provided" and that word's equivalent in the French versions of same statutory provisions.
53. We found that the English version of paragraph 32(a) using the word "provided" is showing "*qui ont été fournis*" in its equivalent French version.
54. The Ontario legislation's paragraph 49(c) uses the words "*compiled solely for...*" and shows an equivalent French version by using the words "*recueillis dans le seul but de...*".
55. The dictionary Le Petit Robert (New Edition, 1989) defines "*fournir*" as meaning "*donner, procurer, faire avoir (fournir des renseignements à quelqu'un), pouvoir de ce qui est nécessaire*" and in contrast, it defines "*recueillir*" as meaning "*prendre en cueillant ou en ramassant, récolter ou rassembler (réunir des éléments)*".
56. The Webster Dictionary (Edition 1989) defines "*to provide*" as meaning "*to arrange for, to supply, to prepare*" and in contrast, defines "*to compile*" as meaning "*to collect, or make up from various sources; to amass; to gather data*".
57. The Collins-Robert English/French Dictionary (6<sup>th</sup> Edition, 2002) translates "*fournir*" as meaning "*to supply, to provide, to furnish, to give*" and translates "*provide*" to mean "*fournir, munir, pouvoir, procurer*". In contrast, this Dictionary translates "*compiled*" as meaning "*compiler, élaborer, dresser*" and translates "*recueillir*" to mean "*to gather, to collect*".

58. Additionally, the word “*provided*” is used in other provisions in the New Brunswick statutes. For instance, we refer to section 18:

Information provided in confidence to a government  
– Renseignements fournis par un gouvernement

*18(1) ....could reasonably be expected to reveal information provided, explicitly or implicitly, in confidence.....*

*18(1) ....risquerait vraisemblablement de révéler des renseignements fournis, explicitement ou implicitement, à titre confidentiel.....*

59. In fact, we found that the word “*supplied*” is also used to mean “*fournir*” in its French equivalent in paragraph 22(1)(b) of the Act:

*(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party...*

*b) des renseignements d'ordre commercial, financier, professionnel, scientifique ou technique, lesquels ont été fournis à l'organisme public par un tiers...*

60. We also observe that the word “*compiled*” has been used in a different context in paragraph 21(2)(b) but its meaning still differs from “*provided*” (and mirrors the meaning found in the Ontario statute):

*(b) the personal information was compiled and is identifiable...*

*b) les renseignements personnels ont été recueillis et peuvent être assimilés...*

61. We can only conclude from our reading of these provisions that the New Brunswick legislators attributed different meanings to the words “*provided*” and “*compiled*” and we cannot ignore this fact when tasked with the interpretation of paragraph 32(a).

62. With all of the above in mind, we turned to the application of the exception found in paragraph 32(a) of our statute, which serves as an exception to the general rule that people have a broad right of access to their personal information held by public bodies.

63. “*Personal information*” is defined to mean recorded information about an identifiable individual, such as name, address, family history, source of income and so on. Personal information also includes education and employment history and “*views or opinions expressed about an individual by another person*” (paragraph 1(m) of the Act).

64. Views and opinions expressed about a person therefore encapsulate comments made about a person during a test or assessment of that person; it follows that results of an employment evaluation process belong to the candidate as that individual's own personal information.
65. The next question is whether a candidate has a right of access to his or her own personal information when that information consists of competition information, i.e., the information regarding that person's participation in the employment evaluation process.
66. Individuals have the right to access their own personal information held by public bodies as set out in section 7:

7(1) Subject to this Act, every person is entitled to request and receive information relating to the public business of a public body, including, without restricting the generality of the foregoing, any activity or function carried on or performed by any public body to which this Act applies.

7(2) Without limiting subsection (1), every individual is entitled to request and receive information about himself or herself.

7(3) The right to request and receive information under subsection (1) does not extend to information that is excepted from disclosure under Division B or C of this Part, but if that information can reasonably be severed from the record, an applicant has a right to request and receive information from the remainder of the record.

67. Section 7 sets out an individual's right of access to his or her personal information with a proviso found in subsection 7(2), a right of access "without limiting subsection (1)". A more complete interpretation of subsection 7(2) (as we found in Report of Findings 2012-752-AP-381) is:

*Without limiting, restricting or affecting the right that every person is entitled to request and receive information relating to the business of a public body, which right is subject to other rules found in the Act, every individual is entitled to request and receive information about himself or herself.*

68. This right of access to an applicant's own personal information is broad and is reflected in a duty to provide reasons for discretionary decisions that may affect an applicant. For instance, paragraph 26(2)(e) is an exception to the section 26 exception that will not

permit a public body to refuse access to advice, opinions or recommendations that concern an applicant by directing the public body to provide a statement of the reasons for a decision that was made in the exercise of a discretionary power that affected the applicant.

69. We take stock in this important point in that the *Act* exemplifies the public body's answerability in making decisions that affect individuals.
70. Having said this, however, access to one's personal information is not an absolute right as the *Act* provides some exceptions to this right, although these exceptions are few and specific. Cases include those in which section 28 applies: where the release of an applicant's personal information may threaten or harm public safety or the safety of another person; or to which paragraph 32 (a) applies: where the applicant's character reference was obtained by the employer public body on the understanding that it be kept confidential, a reference that determines that person's suitability for a job.
71. It follows that paragraph 32(a) can permit a public body to either grant or refuse access to an applicant his or her own personal information when:
- the information about the applicant was *provided* in confidence, either explicitly or implicitly, and
  - the information was *provided* for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or the award of a contract.
72. Paragraph 32(a) is a discretionary exception to disclosure, meaning the applicant's personal information cannot automatically be refused. This means that a public body must consider the context in which the applicant-candidate's information was provided, i.e., if given both to the public body and in confidence.
73. In the present case, NBCC relied on paragraph 32(a) to withhold the information in both competition files as NBCC saw the entire process as one that is confidential and one that should protect other candidates' personal information; in other words, NBCC looked to paragraph 32(a) to protect its entire evaluation process. Paragraph 32(a), however, was not intended for that purpose. This exception provision only serves to protect certain kinds of the Applicant's personal information rather than the entire competition assessment process.

74. We now explain the reasons why paragraph 32(a) does not apply to the Applicant's request for access to various kinds of records found in the competition files in this case.

*Other candidates' personal information*

75. The Applicant sought access to other candidates' personal information found in the relevant competition records, but this information was not obtained by NBCC for the purpose of determining the Applicant's suitability, eligibility or qualifications for the position. In other words, their information has nothing to do with the Applicant's evaluation and for this reason paragraph 32(a) has no application as other candidates' personal information is not captured within the scope of paragraph 32(a).
76. This does not mean that NBCC was incorrect in refusing access to other candidates' information, only that paragraph 32(a) was not the proper authority to do so.
77. The appropriate protection of other candidates' personal information is found under section 21 where disclosing such information would result in an unreasonable invasion of another person's privacy. For instance, other candidates' cover letters and resumes contain details about their educational backgrounds and work history and this type of information is protected under paragraph 21(2)(e) as it "relates to the third party's employment, occupational or educational history".
78. We add that in making the Complaints, the Applicant questioned whether the names of other candidates could be redacted and the remainder of the records provided for the Applicant to be able to determine whether the other candidates met the competition requirements. In our view, the level of detail provided in these records (where the other candidates attended school, years attended, course of study, academic achievements and honours, a chronology of various places a candidate has worked, job responsibilities and functions and so on), would have revealed who these persons were even if their names were redacted as this would not have been sufficient to protect their identities.
79. Accordingly, we find that NBCC properly refused access to other candidates' information in relation to their educational and employment history and qualifications for the advertised positions in their entirety, but on the basis of paragraph 21(2)(e), not paragraph 32(a).
80. The competition files also contained other types of personal information belonging to the other candidates: completed interview guides by the interview panel and completed



rating guides for each candidate setting out the scores assigned for each requirement, as well as supporting comments. All of this information is personal information and is protected under paragraph 21(2)(h) as it consists of “personal recommendations or evaluations...”. Again, severing of the names but releasing the remainder of the information would not have been appropriate as the remainder of the information may have led to the identification of these individuals.

81. We find that NBCC properly refused access to other candidates’ assessment information although not under paragraph 32(a) but rather pursuant to paragraph 21(2)(h) of the *Act*.

*Applicant’s assessment information*

82. NBCC refused access to records that detailed the assessment of the Applicant during the competition process, which included the completed interview guides by each member of the interview panel and the completed rating guide setting out the Applicant’s rating scores and supporting evidence comments. We therefore come back to the applicability of the exception to disclosure found in paragraph 32(a) of the *Act* for this type of information.
83. The records in question contain the interview panel’s observations and comments on the Applicant’s performance during the interview and suitability to the advertised position, as well as the scores assigned to the Applicant as a result of the evaluation process. Such information clearly is personal information that belongs to the Applicant.
84. Because this is so, paragraph 32(a) can be considered; however, the public body must satisfy the remaining essential elements: the confidentiality of the information and whether it was provided to NBCC for the purpose of determining the Applicant’s suitability, eligibility or qualifications for the two competitions in this case.
85. Was the Applicant’s personal information provided to NBCC in this case and if so, was it provided in confidence?
86. Our investigation showed that these records were created during a confidential evaluation process for the advertised competitions, and we do not question that the evaluation process was intended to be a confidential one. Having said this, however, we did not find that the personal information was “provided” to NBCC.

87. The Applicant's assessment process was conducted by NBCC's evaluation panel, i.e., officials of NBCC appointed to conduct the competition evaluation process. These officials therefore created or generated the information that constituted the Applicant's evaluation and the information was not received by NBCC from external parties. NBCC could not treat this information as having been "provided" to NBCC.
88. Paragraph 32(a) aims to protect only that information that has been given to NBCC during the Applicant's evaluation process (the suitability for the job) and provided on a confidential basis. Both of these elements must be present for paragraph 32(a) to be applicable. In this case, however, the Applicant's personal information in the form of evaluation information was not *provided* to NBCC and this alone meant that the exception did not apply to refuse access to the information.
89. For these reasons, we do not find that the Applicant's evaluation information falls within the scope of the paragraph 32(a) exception and NBCC was incorrect in relying on this exception to refuse access. Accordingly, this requested information ought to have been provided to the Applicant and a recommendation in this regard will follow.

#### *Appointment Request Memo*

90. Access to some information included in one of the competition files an appointment request memo that was prepared by NBCC at the completion of the assessment process. NBCC refused access to this information in full and on the basis of paragraph 32(a).
91. We examined this record and it sets out the basic details of the assessment process and included different types of information. Most of this information was not personal information of the Applicant, thus removing the applicability of paragraph 32(a).
92. In considering the release of the memo, we find that NBCC ought to have considered that some of this information was already known to the Applicant and that it was therefore not reasonable to protect such information in the circumstances. For instance, the names of the interview panel members were known to the Applicant and were employees at NBCC, and the names of the successful candidates who were appointed to the positions and made publicly known.
93. In the memo, there were statistics about the number of applications (how many were screened in, how many were interviewed, how many were disqualified, and how many were placed on the eligibility list). The statistics are not personal information of the

Applicant thereby removing the applicability of paragraph 32(a); moreover, these statistics were not identifiable personal information and ought to have been disclosed.

94. The memo also contained a brief statement about the reasons why the Applicant was not chosen as the successful candidate. This information did constitute the Applicant's own personal information and the Applicant had a right of access. Furthermore, NBCC created this information and it was not provided to NBCC by external sources and for that reason, paragraph 32(a) could not permit NBCC to prevent the Applicant from having access to this personal information.
95. Finally, the memo contained a brief statement about the successful candidate's overall score and this information belonged to a third party as personal information and was properly protected under paragraph 21(2)(h) of the *Act* rather than under paragraph 32(a).
96. We find that this record should have been provided to the Applicant, with redactions to protect the personal information of the successful candidate relating to that person's overall score.

*Any other information belonging to the Applicant in the competition files access to which could have been refused under paragraph 32(a)?*

97. Our review of all of the relevant records revealed that there were no records containing information on the suitability of the Applicant for these competitions that had been provided to NBCC by outside sources in a confidential manner. In that regard, paragraph 32(a) could not apply to any of the relevant records in this case.

*Applicability of other exceptions to disclosure in relation to the relevant records in this case?*

98. Recognizing the point raised by NBCC that the employment competition evaluation process ought to be safeguarded, we also looked to other exceptions found in the *Act* to ferret out whether this type of information could be otherwise properly protected from disclosure. In other words, we examined whether NBCC could have properly refused access to the employment competition information but under a different exception.

99. The only other provision we found that might have applied was section 31, a discretionary exception to disclosure to be used when the release of information may reasonably be expected to prejudice the use or results of particular tests or audits.
100. Section 31 states that specific techniques or tests should not be made publicly available because their effectiveness could be compromised and could unnecessarily give a person an unfair advantage over the others who are not privy to the tests. Stated differently, section 31 is designed to protect the integrity of a testing or audit process and this exception can be applied to refuse access to a request to receive specific questions used during an examination or found on a test.
101. In this case, however, NBCC gave the Applicant access to the evaluation questions so we understand that NBCC was not seeking to protect the integrity of that part of the evaluation process. In that regard, section 31 would not be applicable in any event.

## FINDINGS AND RECOMMENDATIONS

102. We find that NBCC conducted a thorough search for all of the relevant records in relation to the Requests, save for overlooking some records in the Applicant's Employee Self-Service account and Outlook calendar. NBCC properly applied paragraphs 21(2)(e) and (h) to protect the personal information of students and certain employees of NBCC in relation to the correspondences that were disclosed to the Applicant.
103. We find, however, that NBCC was incorrect in relying on paragraph 32(a) to refuse the Applicant access to all of the information contained in the competition files on the basis that the evaluation process was confidential.
104. As for the personal information of other candidates contained in the competition files, we find that NBCC was correct in refusing access to this information in its entirety, but on the basis of protecting the other candidates' privacy under paragraphs 21(2)(e) and (h) of the *Act*.
105. On the question of access to the Applicant's personal information in the competition files, we do not find that the completed interview and rating guides fall within any exception to disclosure found in the *Act* and should have been provided to the Applicant as it consists of the Applicant's personal information.

106. As for the Appointment Request Memo that was prepared at the conclusion of the evaluation process in one competition file, this record does not fall within the scope of paragraph 32(a) and we find that this should have been disclosed to the Applicant, albeit with some redactions about the successful candidate's personal information in accordance with paragraph 21(2)(h).
107. Based on all of the above, we recommend pursuant to subparagraph 73(1)(a)(i) of the *Act* that:
- a) NBCC conduct additional searches for the Applicant's personal information and provide any additional records found to the Applicant;
  - b) NBCC provide legible copies of the screening sheets, with the personal information of other candidates redacted to protect their privacy;
  - c) NBCC provide the following records to the Applicant as they do not merit protection from disclosure under paragraph 32(a):
    - The completed interview guides used for the Applicant only;
    - The completed Applicant Rating Guide used for the Applicant only; and,
    - The Recommendation of Appointment memo, with some of the successful candidate's personal information redacted as indicated above in this Report.

Dated at Fredericton, New Brunswick, this \_\_\_\_\_ day of February, 2014.

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Anne E. Bertrand, Q.C.  
Commissioner